> *of the court*, but shall not be reviewed or redetermined by any other court or agency; and no suit brought for the purpose of restraining a renegotiation or the enforcement thereof, or the withholding or recovery of any amounts pursuant thereto, or for the purpose of compelling any action in disregard of a renegotiation, shall be maintained in any court, nor shall any renegotiation be set aside or disregarded in any suit or action in any court. The Court of Claims shall not set aside the determination made in the order unless it first appears that one or more material facts stated pursuant to subsection (c)(1) as the basis therefor are wrong or that the determination is based on one or more errors of law. If the determination is set aside by the court, the court shall determine the amount of excessive profits." 90 Cong. Rec. 531.

It will be seen that this amendment, among other things, proposed review by this Court of the Court of Claims' determination, but even under this amendment any other form of appellate review was expressly prohibited. The amendment was rejected. 90 Cong. Rec. 535. Again Congress expressed its intent that there should be no direct appeal from the Court of Claims' decision. When the Tax Court was restored to the bill in conference, the finality clause remained as originally written. In fact, the finality clause did not change in any respect throughout the entire legislative process.

In sharp contrast, however, to this insistence of Congress that there be no appellate review beyond the Tax Court under the 1943 Act, was the action it took when it came to pass the 1948 Act. In this later Act it specifically provided that the Tax Court's "redetermination shall be subject to review to the extent and in the manner provided by subchapter B of Chapter 5 of the Internal Revenue Code".

Section 3(e), 62 Stat. 259, 50 U. S. C., App. 1193(e). This applied the appeal provisions already pertaining to tax cases (26 U. S. C. 1140-1146) to renegotiation cases in the Tax Court arising under the 1948 Act. It is important to note that when Congress wanted to provide for direct appeal from the Tax Court decision, it knew how to do so; it applied appellate provisions entirely absent from the 1943 Act.

Furthermore, when Congress came to pass the 1951 Act it pulled back and reverted to its earlier concept; it again restricted review of the administrative Board's decision solely to the Tax Court. It employed identically the same language it had used in the 1943 Act. Referring to this action in the course of the debate in the House on the 1951 Act, Mr. Curtis, of Nebraska, said (97 Cong. Rec. 595):

> I believe that the power vested in this bill is so great that there should be an appeal beyond the appeal provided to the Tax Court. Objection has been raised to that. We are told that it is an administrative matter; that it is a matter that calls for discretion to determine how much the Government should pay for a certain article. Nevertheless, I feel that we are on such dangerous ground in tampering with the right of contract that it should be safeguarded in every way and that anyone aggrieved should have access to the courts of the land. I regret that the bill does not so provide. My amendment for such appeals, as well as my amendment to place E. C. A. contracts under the renegotiation law, was rejected by the Committee.

So again, when Congress wanted to limit direct review to the Tax Court, it knew how to do so. Like in the 1943 Act, although a long list of Internal Revenue sections are adopted into the 1951 Renegotiation Act, Section 1141, pro-

viding for appeal from the Tax Court to the Courts of Appeals, is conspicuous by its absence.

From the foregoing, it is apparent that the legislative history supports the clear wording of the statute that the order of the Tax Court finally determining the amount, if any, of excessive profits "shall not be reviewed or redetermined by any court or agency", and, as this Court held in *Macauley* v. *Waterman,* the term "amount" was intended by Congress to include questions of coverage.

III.

THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT OR WITH ANY OF ITS OWN PRIOR DECISIONS IN RESPECT TO DIRECT JUDICIAL REVIEW OF COVERAGE ISSUES.

This Court has on occasion discussed the question of whether renegotiation decisions of the Tax Court are subject to direct or collateral judicial review, but so far the Court has found it unnecessary to rule upon any such questions and they have always been expressly reserved for possible future determination. Nevertheless, in the course of these discussions, the Court has expressed views which we consider relevant to the questions presented in this proceeding. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540 (1946); *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (1947); *Lichter* v. *United States,* 334 U. S. 742 (1948).

In each of those cases this Court held that under the provisions of the Renegotiation Act, as amended, the Tax Court has "exclusive jurisdiction, by order, to finally determine" all questions of fact and law presented to it by an aggrieved contractor under authority of Section 403(c)

of the Renegotiation Act, and, that Congress expressly intended that no other court should have jurisdiction to consider such questions, at least until they have been passed upon by the Tax Court in the exercise of its "exclusive jurisdiction" over such matters.

In *Macauley* v. *Waterman*, the Court was even more specific. After pointing out that the Act confers exclusive jurisdiction upon the Tax Court, by order, "to finally determine the amount, if any, of" a contractor's excessive profits, it held that "a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits"; therefore, that the Tax Court's exclusive jurisdiction extended to and included the power to redetermine all such "questions of coverage". The *Macauley* case is particularly relevant to the present case, because the basic question of coverage involved there was *identical* to the one presented here. Referring to Waterman's Red Sea charters, which were made under identical circumstances, this Court noted that the legislative history of the Renegotiation Act shows that Congress intended the Tax Court to have "exclusive jurisdiction" to decide all questions of law and fact, which latter, the Court said, "*included the issue raised here of whether the contracts in question are subject to the Act.*"

By holding that the Tax Court had such exclusive jurisdiction "to finally determine" the same question of coverage as the one which the Tax Court determined adversely to the Government in this case, this Court clearly indicated that it considered questions of coverage to be on a parity with questions of monetary amount, so far as the finality provisions of the Act are concerned. If so, it would reasonably follow that the Act's prohibition against direct judicial review, which is specifically applicable to final determinations of the Tax Court in respect to the "amount"

of a contractor's excessive profits under a contract, would be equally applicable to determinations of the Tax Court as to whether the contract is a renegotiable contract. Moreover, in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, we find an extended discussion of the degree of finality which this Court thought Congress intended to accord decisions of the Tax Court in respect to renegotiation cases. The Court again found it unnecessary to decide whether an aggrieved contractor has any right to a judicial review, directly or collaterally, of a Tax Court decision, but in an opinion by Mr. Justice Rutledge the Court discussed the legislative history of the act and said (pp. 767-770):

"The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision.

"There can be no doubt whatever, in view of the legislative history, that Congress had each of these ends in

view when it provided for the Tax Court proceedings, as well as for action by the Board prior to that stage. Indeed the Board was created in large part to bring under a single aegis the last stage of informal renegotiation before the Tax Court action, in order thus to secure as nearly as possible uniform policy and administration of renegotiation problems. This policy was followed and reinforced in the provision for Tax Court redetermination. And that procedure was chosen deliberately in preference to judicial review in the Court of Claims or elsewhere, primarily because of the Tax Court's expertness in fiscal matters analogous to those arising in connection with renegotiation problems, as well as its essentially judicial procedures and experience.

"It is equally clear that Congress intended to endow the Tax Court's decisions with a very large degree of finality, as appears from the very terms of §403(c)(1), from the whole structure of the Act, and from the legislative history. The express command of §403(c)(1) is not simply that the Tax Court shall have "exclusive jurisdiction, by order, to finally determine" the amount of excessive profits, if any. It is also that the determination "shall not be reviewed or redetermined by any court or agency." This is buttressed by the prohibition that filing the petition shall not operate to stay execution of the Board's order under §403(c)(2). And not irrelevant to the statute's general policy of finality are the provisions making the Board's determinations final, if the petition for Tax Court redetermination is not filed in the specified time, and those of the Secretary or his delegates final if similar action is not taken to secure redetermination by the Board. §403(c)(1).

"True, the statute expressly confers rights to follow through the various stages of the procedure to the end of the Tax Court phase. Nevertheless its entire structure indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotia-

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IN THE

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OCTOBER TERM, 1954

No. 263

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, *Petitioners*

v.

CALIFORNIA EASTERN LINE, INC.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE ON BEHALF OF ESTATE OF ROBERT I. GALE, DECEASED, ROBERT I. GALE, JR., EXECUTOR, GUY W. WATERS AND EDGAR H. VOGEL, AND BRIEF AS AMICI CURIAE.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The Estate of Robert I. Gale, Deceased, Robert I. Gale, Jr., Executor, Guy W. Waters and Edgar H. Vogel, (hereinafter referred to as the "Applicants") hereby respectfully move for leave to file a brief as *amici curiae* in this case. The consent of the counsel for the Petitioners has been obtained. The consent of the counsel for the Respondent was requested but refused.

The interest of the Applicants in this case arises from the fact that they are petitioners for review of a decision of the Tax Court, 19 T.C. 1107, under the Renegotiation Act of 1942, as amended, in a case now pending in the United States Court of Appeals for the District of Columbia Circuit. *Estate of Robert I. Gale, deceased, Robert I. Gale, Jr., Executor, Guy W. Waters and Edgar H. Vogel* v. *United States of America,* No. 11906, C.A.D.C.

The *Gale* case, like the case at bar, raises the issue of whether a litigant is entitled to judicial review of a Tax Court decision that a particular contract is, or is not, subject to the Renegotiation Act. Specifically, in the *Gale* case the question is whether an agreement for the cancellation on December 30, 1943 of a certain long-term contract, entered into in 1934 and continuing in effect thereafter, for the management and direction of the sales of a division of a steel company, is a subcontract within the definition contained in § 403 (a)(5)(B) of the Renegotiation Act and is hence subject to the Act.

When the petition for review in the *Gale* case was filed in the District of Columbia Court of Appeals it appeared certain that under 26 U.S.C. 1141 (a) and the decisions of the Court of Appeals in *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, and *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, that Court had jurisdiction to review the decision of the Tax Court. However, in oral argument, questions were raised by the Court as to whether its decisions in the case at bar and *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, precluded such review.

The *Gale* case was argued in the United States Court of Appeals for the District of Columbia Circuit on April 14, 1954. Two other cases arising under the Renegotiation Act were argued before that Court during the month of May 1954. *Hanlon-Waters, Inc.* v. *United States*, No. 11934, C.A.D.C.; *Jacob Lichter, et al.* v. *United States of America, et al.*, No. 11925, C.A.D.C. Since none of these cases has yet been decided, it appears that the Court of Appeals is withholding decision pending the decision of this Court in the case at bar. While the *Gale* case presents certain factual and legal aspects not present in the case at bar, it is evident that the decision of this Court in the latter case may determine whether the Court of Appeals will review the decision of the Tax Court in the *Gale* case.

As the Petition for Writ of Certiorari and the brief of the Government reveal, because of the background from which the case at bar has evolved, the position which the

Government takes in this case is a special one. For this reason, the Applicants believe that they may assist this Court by more specifically setting forth the position of a litigant who seeks judicial review of a decision of the Tax Court concerning the status under the Renegotiation Act of a particular contract.

A petition for review filed by a contractor with the Government may raise constitutional and other questions not present in connection with such a petition filed by the Government itself. However, it is the contention of the Applicants that, aside from and in addition to these considerations, the language and legislative history of the Renegotiation Act impel the conclusion that a litigant is entitled to judicial review of a decision of the Tax Court that a particular contract is, or is not, subject to the Renegotiation Act, and that such review is available to the Government, as well as to a contractor. The Applicants, therefore, believe that a brief filed by them as *amici curiae* may assist this Court in determining the basic issue presented in the case at bar.

Respectfully submitted,

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BRIEF OF ESTATE OF ROBERT I. GALE, DECEASED, ROBERT I. GALE, JR., EXECUTOR, GUY W. WATERS AND EDGAR H. VOGEL, AS AMICI CURIAE.

STATUTES INVOLVED.

The pertinent provisions of the Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U. S. C. App. 1191), and of Section 7482 of the Internal Revenue Code of 1954 (P. L. 591, 83d Cong., 2d Sess., Title 26 U. S. C.) are set forth in Appendix A, *infra,* pp. 27-30.

INTEREST OF THE AMICI CURIAE.

The *amici curiae* herein are petitioners for review of a decision of the Tax Court, 19 T. C. 1107, under the Renegotiation Act [1] in a case now pending in the United States

[1] When used herein, the term "Renegotiation Act" refers to § 403 of the Act of April 28, 1942, C. 247, Title IV, 56 Stat. 245, as amended, 50 U. S. C. App. 1191.

Court of Appeals for the District of Columbia Circuit, No. 11906, entitled "*Estate of Robert I. Gale, deceased, Robert I. Gale, Jr., Executor, Guy W. Waters and Edgar H. Vogel* v. *United States of America*".

The *Gale* case, like the case at bar, raises the issue of whether a litigant is entitled to judicial review of a Tax Court decision holding that a particular contract is, or is not, subject to the Renegotiation Act. Specifically, in the *Gale* case the question is whether an agreement for the cancellation on December 30, 1943 of a certain long-term contract, entered into in 1934 and continuing in effect thereafter, for the management and direction of the sales of a division of Crucible Steel Company, is a subcontract within the definition contained in § 403 (a)(5)(B) of the Renegotiation Act (50 U. S. C. App. 1191 (a)(5)(B)) and is hence subject to the Renegotiation Act.[2]

When the petition for review in the *Gale* case was filed in the District of Columbia Court of Appeals it appeared certain that under 26 U. S. C. 1141 (a) and the decisions of the Court of Appeals in *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, and *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, that Court had jurisdiction to review the decision of the Tax Court. However, in oral argument, questions were raised by the Court as to whether its decisions in the case at bar and *United States* v. *Martin Wunderlich Co.*, 211 F. 2d 433, precluded such review.

The *Gale* case was argued on April 14, 1954 before Edgerton, Miller and Bazelon, JJ. Two other cases arising under the Renegotiation Act were argued before the Court on May 12, 1954. *Hanlon-Waters, Inc.* v. *United States*, C. A. D. C. No. 11934 (Miller, Bazelon and Fahy, JJ.); *Jacob Lichter, et al.* v. *United States of America, et al.*, C. A. D. C. No. 11925 (Miller, Bazelon and Fahy, JJ.).

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[2] Since the *amici curiae* had no other renegotiable contracts or subcontracts, unless their contract was a subcontract within the definition contained in § 403 (a)(5)(B), the Tax Court had no jurisdiction to determine that the *amici curiae* had received excessive profits.

See Petition for Writ of Certiorari, p. 11. Since none of these cases has yet been decided, it appears that the Court of Appeals is withholding decision pending the decision of this Court in the case at bar. While *Gale* presents certain factual and legal aspects not present in the case at bar, it is evident that the decision of this Court in the latter case may determine whether the Court of Appeals will review the decision of the Tax Court in the *Gale* case.

SUMMARY OF ARGUMENT.

I.

Analysis of the language and legislative history of the Renegotiation Act impels the conclusion that the Court of Appeals for the District of Columbia Circuit has jurisdiction to review Tax Court decisions under the Act. Only the Tax Court's determination of the *amount of excessive profits* has been withdrawn from review.

Section 403 (e)(1) of the Renegotiation Act does not, by its terms, prohibit judicial review of a decision of the Tax Court or its "order". Only review of the "determination" of "the amount, if any," of excessive profits is prohibited. The significance of the language in § 403 (e)(1) is emphasized by contrast with § 403 (c)(1) and § 403 (c)(4). The first of these sections provides, in substance, that when the Board issues a unilateral order and the contractor fails to exhaust his administrative remedy by filing a petition with the Tax Court, the "order" of the Board, not merely its "determination" of "the amount, if any, of excessive profits", is final and conclusive and shall not be subject to review or redetermination. § 403 (c)(4) provides that when the Board and a contractor enter into an agreement, in the absence of "a showing of fraud or malfeasance or a willful misrepresentation of a material fact, . . . such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding." Thus the Congress attached different consequences to the diverse

steps which may be taken in the renegotiation process. Under § 403 (c)(1) and § 403 (c)(4), certain deliberate action or inaction in the course of the administrative process will result in waiver of all rights to review. But the administrative process ends with the Tax Court's decision and order, and nothing in the language of § 403(c)(1) deprives an aggrieved party of judicial review of the Tax Court's decision if the question presented is whether the Court, in making a determination of *amount*, or in refusing to make a determination, acted within the scope of the Renegotiation Act.

While the original Renegotiation Act passed in 1942 did not by its terms provide for judicial review, the Congress and the renegotiating agencies believed that such review was available to contractors. Hearings before the House Committee on Naval Affairs pursuant to H. R. Res. No. 30, 78th Cong., 1st Sess. (1943), Vol. 2, pp. 433, 506-509; Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 31-32, 71-72, 819, 821, 842, 882. § 403 (c)(1), which was added to the Act in 1944, was drafted in response to requests of contractors for additional safeguards, including specific provision for judicial review. Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 266, 270, 487-489, 506-509, 518-519, 524-525, 527, 531-532, 551, 646, 673, 842-846, 851, 882, 959, 974-975, 982-983, 1039, 1041; Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), pp. 386, 409, 990, 1015-1016. The evidence indicates that in drafting § 403 (c)(1) the Congress intended to make provision for judicial review, and also to provide, at some stage in the renegotiation process, a redetermination of excessive profits in a *de novo* proceeding of record. See H. R. Rep. No. 733, 78th Cong., 1st Sess. (1943), p. 60; H. R. Rep. No. 871, 78th Cong., 1st Sess. (1943), pp. 76-77. Because the distinction between these objectives was sometimes obscured in the hearings and debates, the degree of finality which the Con-

gress intended to attach to Tax Court decisions under the Act is not immediately evident from the legislative history. However, analysis reveals certain significant facts, discussed in some detail in this brief, which impel the conclusion that the Congress intended to prohibit judicial review of the Tax Court's factual determinations of the *amount* of excessive profits, either upon petition for review or in collateral proceedings, but that it did not intend otherwise to limit the review of Tax Court decisions available under § 1141 (now § 7482) of the Internal Revenue Code.

The Renegotiation Board officials who sponsored the 1951 Renegotiation Act believed that review was available under the World War II Act, and that the incorporation in the 1951 Act of language (50 U. S. C. App. 1218) similar to that in § 403 (e)(1) would not preclude review under the latter Act. Hearings before the House Committee on Ways and Means on H. R. 9246, 81st Cong., 2nd Sess. (1950), p. 18. The 1951 Act contains internal evidence that the Congress believed that the § 403 (e)(1) language did not preclude judicial review. 50 U. S. C. App. 1216 (a)(6), 1216 (a)(8), 1218.

II.

An aggrieved contractor, who asserts that the Tax Court, in making a determination of excessive profits, exceeded its authority under the Renegotiation Act, is entitled, under the Constitution and decisions of this Court, to judicial review.

A construction of § 403 (e)(1) which would preclude all judicial review would, in the case of an aggrieved contractor, violate the Constitution or, at least, present a serious constitutional question and should be avoided. See *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 491-492.

The determination of the statutory basis of an administrative agency's action is a judicial function. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *Federal Communications*

Commission v. *Pottsville Broadcasting Company*, 309 U. S. 134, 144-145.

When a contractor believes that the Tax Court, in determining the amount of excessive profits, has exceeded the statutory limits of the Renegotiation Act, the due process clause of the Fifth Amendment immediately becomes relevant. In such a situation the Courts must have power in a proper proceeding to grant relief. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. See also *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619-620; *International Railway Co.* v. *Davidson*, 257 U. S. 506; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337; *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127.

In upholding the constitutionality of other World War II legislation, this Court has uniformly found that ultimate judicial review was specifically provided or otherwise available. *Estep* v. *United States*, 327 U. S. 114; *Bowles* v. *Willingham*, 321 U. S. 503, 521; *Yakus* v. *United States*, 321 U. S. 414, 442, 444. Cf. *Cities Service Company* v. *McGrath*, 342 U. S. 330. The denial of judicial review under the Renegotiation Act would appear to be without precedent in analogous cases decided by this Court.

The District of Columbia Court of Appeals is a proper forum for the judicial review of Tax Court decisions under the Renegotiation Act. § 7482 (formerly § 1141) of the Internal Revenue Code. See also § 3 (e) of the Renegotiation Act of 1948, 50 U. S. C. App. 1193 (e).

That Court has held that it has jurisdiction to review Tax Court decisions under the Renegotiation Act on constitutional and jurisdictional grounds. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U. S. 912; *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U. S. 967. Its refusal to review in the case at bar is based upon an artificial distinction between jurisdiction and "coverage". The question whether

a particular contract is a contract or subcontract as defined in the Renegotiation Act is jurisdictional in the most fundamental sense and cannot be avoided merely by terminology.

III.

The Petitioner is entitled to review in the United States Court of Appeals for the District of Columbia Circuit of a decision of the Tax Court that a specific contract is not a contract or subcontract defined in the Renegotiation Act. As demonstrated herein, such a decision presents a reviewable question, and the position of the Petitioner is analogous to that of the Commissioner of Internal Revenue, who may invoke the jurisdiction of the Courts of Appeals under § 7482 of the Internal Revenue Code to review decisions of the Tax Court under the revenue laws. See *Commissioner of Internal Revenue* v. *Liberty Bank & Trust Co.*, 59 F. 2d 320 (C. C. A. 6). The nature and purpose of the Renegotiation Act evidence the intent of Congress that review may be invoked by a renegotiating agency, as well as a contractor. See *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 431; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279.

ARGUMENT.

I.

Analysis of the Language and Legislative History of the Renegotiation Act Impels the Conclusion That the Court of Appeals for the District of Columbia Circuit Has Jurisdiction to Review Tax Court Decisions Under the Act. Only the Tax Court's Determination of the Amount of Excessive Profits Has Been Withdrawn from Review.

A. The Text of the Renegotiation Act, as Amended.

Section 403 (e)(1) of the Renegotiation Act (50 U. S. C. App. 1191 (e) (1)) reads in part as follows:

> "Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting

> Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1) [of this section], file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing *such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency.* The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." (Emphasis added).

It is of critical importance that this section does not by its terms interdict review of the entire decision of the Tax Court, as expressed in its "order." The literal prohibition is much more limited. It is stated that "such determination," the determination of "the amount, if any, of such excessive profits . . . shall not be reviewed or redetermined by any court or agency." The language "leaves untouched, by direct reference or otherwise, the remaining content of § 1141 (a) [now § 7482 (a)] of the Internal Revenue Code." *U. S. Electrical Motors, Inc.* v. *Jones,* 153 F. 2d 134, 136 (C. A. D. C.).

The significance of the choice of language in § 403 (e)(1) is emphasized by contrast with other sections of the Act. § 403 (c)(1) (50 U. S. C. App. 1191 (c)(1)) provides in part:

> "If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the

time limit prescribed in subsection (e)(1) [of this section], *such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.*" (Emphasis added).

Thus when a contractor or subcontractor fails to exhaust his administrative remedy by filing a petition with the Tax Court, the "order" of the Board, not merely its determination of "the amount, if any, of excessive profits," is "final and conclusive and shall not be subject to review or redetermination by any court or other agency."

Again, § 403 (c)(4) (50 U. S. C. App. 1191 (c)(4)) reads as follows:

> "For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and *except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact,* (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) *such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.*" (Emphasis added).

Hence, when a contractor or subcontractor chooses to enter into an agreement with the Board, in the absence of "a showing of fraud or malfeasance or a willful misrepresentation of a material fact, . . . such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding."

The Congress attached varying consequences to the diverse steps which may be taken in the renegotiation process. Under § 403 (c)(1) and 403 (c)(4), a contractor (and,

in the case of an agreement, the Board) may by deliberate action or inaction in the course of the administrative process waive all rights of review. But the pertinent portion of § 403 (e)(1) presents an entirely different situation. There the administrative process has ended with the decision and order of the Tax Court. While § 403 (e)(1) says that the Tax Court's *determination* of the *amount*, if any, of excessive profits shall not be reviewed or redetermined, this presupposes a determination in a valid *order* of the Tax Court within the ambit of the Renegotiation Act with respect to profits derived from contracts or subcontracts defined in the Act.[3] Nothing in the language of § 403 (e)(1) purports to deprive an aggrieved party of judicial review of the Tax Court's decision afforded by § 7482 (formerly § 1141) of the Internal Revenue Code if the question presented is whether the Tax Court, in making a determination of the *amount* of excessive profits, or in refusing to make a determination, acted within the ambit of the Renegotiation Act.

B. The Legislative Background.

The genesis of the Renegotiation Act was a one-section, one-sentence amendment to H. R. 6868, 77th Congress, introduced in the House on March 28, 1942 by Mr. Case of South Dakota. 88 Cong. Rec. 3139 (1942). The bill was passed by the House with the Case amendment included. *Id.*, 3140. In the Senate, on April 7, 1942, Senator McKellar offered a more elaborate substitute for the Case amendment. *Id.*, 3387. Included in Senator McKellar's amendment was a sentence reading as follows:

> "No suit or action may be maintained in any court to recover from the United States any amount withheld from a contractor pursuant to the provisions of this subsection."

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[3] § 403 (h) (50 U. S. C. App. 1191 (h)) specifically states that the Act "shall apply *only with respect to profits derived from contracts with the Departments and subcontracts* which [profits] are determined under regulations prescribed by the Board to be reasonably allocable to performance prior to the close of the termination date." (Emphasis added).

This sentence provoked vigorous objection (*Id.*, 3402-3403) and it was amended by the addition of the words "After the expiration of this act," as a preface. *Id.*, 3403. H. R. 6868 was passed by the Senate with the McKellar amendment included. *Id.*, 3410. However, in conference the section dealing with renegotiation was rewritten and the quoted sentence was omitted in its entirety. *Id.*, 3649.

Subsequently, in debate Senator McKellar specifically stated that the rewritten section left no doubt as to the right of a contractor to seek judicial relief. *Id.*, 3652. After the enactment of H. R. 6868 with the renegotiation section included, the right of a contractor to judicial review was emphasized to Congress by representatives of the War Department and the Navy Department responsible for the administration of the Act.[4] Mr. W. John Kenney, then a member and counsel of the Navy Price Adjustment Board, submitted an extensive memorandum demonstrating that, without question, contractors could seek judicial review.[5]

However, in 1943 members of Congress and contractors advocated a specific enunciation of the right to judicial review.[6] Also, it was urged that the failure of the Price

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[4] Hearings before the House Committee on Naval Affairs pursuant to H. R. Res. No. 30, 78th Cong., 1st Sess. (1943), Vol. 2, pp. 433, 506-509; Hearings before the Subcommittee of the House Committee on Appropriations on Mil. Est. App. Bill for 1944, 78th Cong., 1st Sess. (1943), p. 514; Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 31-32, 71-72, 819, 821, 842, 882; Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), pp. 990, 1016, 1037, 1070.

[5] Hearings before the House Committee on Naval Affairs pursuant to H. R. Res. No. 30, 78th Cong., 1st Sess. (1943), Vol. 2, pp. 506, 1039-1043.

[6] Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 266, 270, 487-489, 506-509, 518-519, 524-525, 527, 531-532, 551, 646, 673, 761 (contra), 842-846, 851, 882, 959, 974-975, 982-983, 1039, 1041; Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), pp. 386, 409, 990, 1015-1016.

Adjustment Boards to maintain records of their proceedings made it well-nigh impossible for a contractor to demonstrate that a determination of a Board lacked the necessary evidentiary support and hence largely negatived the value of judicial review.[7]

To overcome these latter objections to the Boards' procedures it was considered necessary to amend the law, either to require the renegotiating agencies to develop a record comparable to that maintained by other administrative bodies, or to provide a *de novo* hearing and record at some subsequent stage of the renegotiation process. There was Congressional sentiment for the first of the alternative correctives, but witnesses for the defense agencies strongly urged the latter. 90 Cong. Rec. 532, 534-535 (1944). They apparently believed that the development of a record in each of the thousands of cases would be administratively impractical and that since nearly all cases were settled by agreement, such records were unnecessary. *Ibid.*

The degree of finality which the Congress intended to attach to Tax Court decisions under the Renegotiation Act is not immediately evident from the lengthy legislative history of the 1944 amendment which added § 403 (e)(1). This is true because in the hearings and debates the distinction between the two objectives, provision for judicial review, on the one hand, and provision for a redetermination in a *de novo* proceeding of record, on the other, was sometimes obscured.

However, upon analysis certain significant facts emerge from the legislative history which impel the conclusion that

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See also H. R. Rep. No. 733, 78th Cong., 1st Sess. (1943), Report of the Committee on Naval Affairs, pursuant to H. R. Res. No. 30, p. 60, recommending that the Act "be amended so as to make specific provisions for judicial review of unilateral determinations".

[7] Hearings before the House Committee on Ways and Means on H. R. 2324, 2698 and 3015, 78th Cong., 1st Sess. (1943), pp. 506-509, 518-519, 531-532, 551, 825-826, 837-839, 842-846, 896-897, 974-975, 982-983.

§ 403 (e)(1) was intended to give finality only to the Tax Court's factual determinations[8] of the *amount of excessive profits* and not otherwise to limit judicial review. Among the most pertinent facts are these:

1. The primary purpose of § 403 (e)(1) was to provide to contractors additional safeguards against possible arbitrary action by the renegotiating agencies.[9] Since judicial review was believed to be already available under the original Renegotiation Act,[10] an intent to cut off all judicial review would have been inconsistent with this primary purpose. And the Congress evidenced no intent to constitute the Tax Court a constitutional or legislative court.

2. The legislative history discloses no compelling expression of Congressional intent to cut off judicial review. No such expression is found in the Committee reports, which merely paraphrase the statutory language.[11] There were isolated statements in the Senate hearings indicating that under the House version of § 403 (e)(1), which was subsequently enacted, a contractor's final resort would be in the Tax Court.[12] However the casual nature of these statements is evidenced by the comment of Judge Patterson, then Under Secretary of War, at one point in the Senate

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[8] For an analysis of the method employed in making such factual determinations, see Appendix B, *infra*, pp. 31-32.

[9] See note 6, *supra*.

[10] See note 4, *supra*.

[11] H. R. Rep. No. 871, 78th Cong., 1st Sess. (1943), pp. 76-77; Sen. Rep. No. 627, 78th Cong., 1st Sess. (1943), p. 109; H. R. Rep. No. 1079, 78th Cong., 2d Sess. (1944), p. 83.

[12] Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), pp. 999, 1015, 1033. One such statement is found in a staff analysis: "The decisions of the Tax Court are not subject to further review." Whether "decisions" is meant to include all questions is not clear from the context. *Data on Renegotiation of Contracts*, Senate Committee on Finance (December 9, 1943), p. 7.

Finance Committee hearings, that "the final resort for *court review* is to the Tax *Board*".[13] (Emphasis added).

3. There appears to have been no considered opinion in the Congress that it had the power to prohibit judicial review of Tax Court decisions, or that determinations of the Tax Court without judicial review would meet the constitutional requirement of due process. In the Finance Committee hearings there is positive evidence to the contrary.[14] Mr. Francis M. Shea, then Assistant Attorney General, in a comprehensive statement on the pending House bill, said in part:

> ". . . this bill is not drafted to be effective as an absolute prohibition of judicial review, if the power so to prohibit did exist in the Congress. I am fearful that it will merely substitute injunction suits for the more orderly process of an adequate remedy at law. In short, assuming the right of the Congress to impose renegotiation orders, I doubt that it can prevent resort to some judicial tribunal on complaint of the contractor that the way renegotiation was done was arbitrary and capricious. I doubt that the legislation is drafted effectively to prevent resort to the courts by injunction suits and other means to review that issue. Provision for appeal to The Tax Court very probably does not constitute an adequate remedy at law which satisfies whatever right there may be to judicial process. The Tax Court is a part of the executive branch of the Government. . . ." [15]

The point made by Mr. Shea was highlighted in the following excerpt from a discourse between Mr. Shea and Senator Clark:

> SENATOR CLARK: Where the administrative agency is the final determining agency, it doesn't make any difference how many there are; it does not mean that he has had his day in court.

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[13] Hearings before the Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. (1943), p. 1015.

[14] *Id.*, 1033, 1036-1038, 1041-1042.

[15] *Id.*, 1037.

MR. SHEA: That is right.

SENATOR CLARK: The essence of a review is a review in court, not by any other administrative agency?

MR. SHEA: I think that is really the case.[16]

4. Mr. Disney, who was Chairman of the Subcommittee on Renegotiation of the House Ways and Means Committee, stated that the Committee's selection of the Tax Court as the agency for redetermination was, in part, because "a forum had to be chosen upon which Congress could impose the duty of deciding the nonjudicial question as to the amount of excessive profits". 89 Cong. Rec. 9929 (1943). Other remarks by Mr. Disney and also by Mr. Jenkins, who was a member of the Committee, appear to anticipate ultimate judicial review. *Id.*, 9930, 9934-9935. The Senate Finance Committee, which had been cautioned by Mr. Shea of the constitutional problems which would arise if the statute were construed to prevent ultimate resort to the judicial process, apparently felt that since a judicial remedy would be required at some stage, responsibility for redetermination could appropriately be placed in the Court of Claims. The Senate debate reveals a positive intent to provide contractors with "a day in court", in the judicial, as distinguished from the Tax Court, sense.[17] 90 Cong.

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[16] *Id.*, 1042.

[17] Senator Truman, in introducing an amendment which would have given the Court of Claims jurisdiction to review, rather than to redetermine in a proceeding *de novo*, said that renegotiation "is, by nature, an administrative function". He said that the "Court of Claims is a real court whose decisions are subject to review on certiorari by the Supreme Court in the same way that decisions of the courts of appeals, for example, are reviewed." Thus he felt that redetermination was unnecessary and inappropriate in the Court of Claims. By contrast, he cited *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S. 716, and emphasized that the Tax Court was merely "an administrative tribunal". The change of its name "did not affect its jurisdiction, powers, or status." Thus "the House bill did not actually give the contractor his day in court". 90 Cong. Rec. 531 (1944). In the debate, Senator Clark, who also desired to give the contractor a day in court, pointed out that unless the Board were required to keep a record of its proceedings there would be no adequate basis for review, as distinguished from redetermination, in the Court of Claims. *Id.*, 532.

Rec. 531-535 (1944). However, since Mr. Shea had advised the Senate Finance Committee that the House bill was not drafted to be effective as an absolute prohibition of judicial review, it is reasonable to conclude that the subsequent concurrence of the Senate conferees and the Senate itself in the House bill was premised upon the understanding that judicial review, except as to the *amount* of excessive profits, would be available to the contractor after decision by the Tax Court.

In summary, the fair deduction from the legislative history of the Renegotiation Act is that the Congress intended in § 403 (e)(1) to prohibit judicial review of the Tax Court's factual determinations [18] of the *amount of excessive profits*, either in the Courts of Appeals or in collateral actions in the District Courts or the Court of Claims, but that it did not intend otherwise to limit the review available under § 1141 (now § 7482) of the Internal Revenue Code.

C. Subsequent Related Legislation.

The Renegotiation Act of 1948 (62 Stat. 258, 259-261; 50 U. S. C. App. 1193), the history of which is very brief, was originally limited in application to funds expended under certain specific appropriations for the construction of aircraft and related equipment and certain Corps of Engineer

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[18] During the years between the passage of the Revenue Act of 1926 (44 Stat. 9) and the decision in *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. 489, on December 20, 1943 (while the pertinent amendment of the Renegotiation Act was pending in the Congress), because of the want of a certain standard for distinguishing "questions of law" from "questions of fact", there had not been a consistent and uniform compliance with the Congressional limitation upon judicial review of decisions of the Board of Tax Appeals (renamed the Tax Court). The *Dobson* decision reaffirmed the statutory limit of judicial review. It is not inappropriate to conclude that the Congressional direction in the Renegotiation Act resulted in part from the lack of uniformity in previous judicial decisions concerning the finality of Tax Court decisions, and that the Congress intended to accord to decisions of the Tax Court in renegotiation cases essentially the same degree of finality which it had by previous legislation given to decisions of the Tax Court in tax cases.

activities. § 3 (e) of the 1948 Act (50 U. S. C. App. 1193 (e)) reads as follows:

> "Agreements or orders determining excessive profits shall be final and conclusive in accordance with their terms and except upon a showing of fraud or malfeasance or willful misrepresentation of a material fact shall not be annulled, modified, reopened, or disregarded, except that in the case of orders determining excessive profits the amount of the excessive profits, if any, may be redetermined by the Tax Court of the United States in the manner prescribed in subsection (e)(1) of the Renegotiation Act of February 25, 1944, as amended, except that such redetermination shall be subject to review to the extent and in the manner provided by subchapter B of chapter 5 of the Internal Revenue Code [26 U. S. C. 1140-1146]." [19]

The Act was approved on May 21, 1948. At that time, however, there was pending in the Congress H. R. 3214 which was enacted on June 25, 1948, revising and codifying Title 28 of the U. S. Code. Section 36 of this latter Act (62 Stat. 869), amended Section 1141(a) of the Internal Revenue Code to provide that the Courts of Appeals shall have jurisdiction to review the decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Thus, when the two Acts are read in conjunction, it appears evident that the scope of review under the Renegotiation Act of 1948 was more extensive than that available either under the earlier Renegotiation Act, or under the Internal Revenue Code prior to 1948. However, since the Renegotiation Act of 1948 was a peacetime measure with

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[19] This section makes clear that the Congress was not troubled by the question of venue raised by the Ninth Circuit in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560. Whatever question might exist under Section 1141 (b)(1) (now Section 7482 (b)(1)) of the Internal Revenue Code with respect to venue in the circuits other than that for the District of Columbia, there appears to be no doubt that venue lies in the District of Columbia Circuit.

limited application, there were obvious reasons for specific provision for more extensive review under that Act.[20]

The Renegotiation Act of 1951 (65 Stat. 7, 50 U. S. C. App. 1211-1233) was designed to meet the exigencies arising from the outbreak of war in Korea. Its framework was essentially the same as that of the World War II Renegotiation Act. § 108 of the 1951 Act (50 U. S. C. App. 1218), like § 403 (e)(1) of the earlier Act, provided that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." In the hearings, representatives of the American Institute of Accountants and certain business and trade associations recommended an amendment to incorporate a specific review provision.[21] Also, in the debates two members of Congress expressed their preference for such an amendment. 97 Cong. Rec. 586, 594 (1951). However, Renegotiation Board officials who were sponsoring the legislation believed that appeal from decisions of the Tax Court was available under the original Renegotiation Act and that therefore appeal would be available under the 1951 Act, which incorporated the language of the earlier Act. This fact is illustrated by the following colloquy in the hearings before the House Ways and Means Committee between Representatives Curtis and Camp, Mr. Frank L. Roberts, then Chairman of

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[20] There was apprehension on the part of Defense Department officials and Senate Appropriations Committee members that contractors in certain industries, which had ample civilian markets, might not seek government contracts subject to renegotiation, and the extension of the scope of review was probably made to reassure these contractors. See Hearings before the Subcommittee of the Senate Committee on Appropriations, on H. R. 6226, 80th Cong., 2nd Sess. (1948), pp. 132-133.

[21] Hearings before the House Committee on Ways and Means, on H. R. 9246, 81st Cong., 2nd Sess. (1950), p. 226; and Hearings before the Senate Committee on Finance, on H. R. 1724, 82nd Cong., 1st Sess. (1951), pp. 72, 78, 88 and 110.

the Military Renegotiation Policy and Review Board, and now a member of the Renegotiation Board, and Mr. Barron K. Grier, counsel for the Military Renegotiation Policy and Review Board:

> MR. CURTIS: Under the old law you did have the right to get in the court on a writ of certiorari. You did not have many cases appealed, did you?
>
> MR. ROBERTS: Under the last act, the Tax Court was designated as the review body. A few cases went to the Tax Court. They did have the right to appeal from the Tax Court on a writ of certiorari.
>
> MR. GRIER: There was no provision in the 1943 act for going beyond the Tax Court. I think some of them did go to the Circuit Court and on to the Supreme Court on a writ of certiorari.
>
> MR. CURTIS: Yes. In this bill you have foreclosed that?
>
> MR. GRIER: No, sir; this is exactly the same. They can go to the Tax Court. There is no further provision in the bill for going into any other court.
>
> MR. CURTIS: It is exactly as the old law?
>
> MR. ROBERTS: Yes.
>
> MR. CAMP: Mr. Grier, is it not a fact that there is a general statute which permits you to appeal from a decision of the Tax Court?
>
> MR. GRIER: That is my understanding.
>
> MR. CAMP: They can go in from the renegotiation board to the Tax Court. Then if they want to go any further, they have the right under the general law to appeal from the decision of the Tax Court. Is that right?
>
> MR. GRIER: I believe that is correct.
>
> MR. CURTIS: That is what you intend to do, at any rate—not take away any rights they have under the general law?
>
> MR. GRIER: That is correct.[22]

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[22] Hearings before the House Committee on Ways and Means, on H. R. 9246, 81st Cong., 2nd Sess. (1950), p. 18. By 1951 the District of Columbia Court of Appeals had several times determined that it had jurisdiction to review decisions of the Tax Court under the World War II Renegotiation Act on jurisdictional and constitutional questions. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; *Blanchard Machine Company* v. *Reconstruction Finance*

The Renegotiation Act of 1951 contains internal evidence that the Congress did not intend that § 108 preclude all review of Tax Court redeterminations. § 106(a)(6) (50 U. S. C. App. 1216 (a)(6)), which provides for the exemption of contracts which the Board determines do not have a direct and immediate connection with the national defense, reads in pertinent part as follows:

> "Notwithstanding section 108 of this title, regulations prescribed by the Board under this paragraph, and any determination of the Board that a contract is or is not exempt under this paragraph, shall not be reviewed or redetermined by the Tax Court *or by any other court or agency*". (Emphasis added).

§ 106 (a)(8) of the Renegotiation Act of 1951, which was added to the Act by § 5 of Public Law 764, 83d Cong., 2nd Sess., approved September 1, 1954, and which provides for the exemption of contracts or subcontracts for the making or furnishing of standard commercial articles, contains the following significant language:

> "Any specific finding of the Board under this paragraph shall not be reviewed or redetermined *by any court or agency* other than by the Tax Court of the United States in a proceeding for a redetermination of the amount of excessive profits determined by an order of the Board." (Emphasis added).

If the Congress had intended that § 108, which repeated the language of § 403 (e)(1) of the earlier Act, precluded *all* review of *Tax Court decisions* under the 1951 Act, and not merely its factual *determinations of the amount of excessive profits*, it would have been superfluous to provide that *determinations of the Board* on preliminary questions

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Corporation Price Adjustment Board, 177 F. 2d 727, certiorari denied, 339 U. S. 912; *King Construction Corporation* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U. S. 943. While the Ninth Circuit reached a contrary result in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, it indicated that the Tax Court's decisions could be collaterally attacked in the district courts.

under § 106, which in any case might not result in the determination of any amount of excessive profits, should not be subject to review or redetermination by *any court or agency* (*except the Tax Court*, in one instance). Thus, it appears evident that when the Congress intended to preclude review of a given determination or finding of the Board or the Tax Court, it specifically stated its intent.

II.

An Aggrieved Contractor, Who Asserts That the Tax Court, in Making a Determination of Excessive Profits, Exceeded Its Authority Under the Renegotiation Act, Is Entitled, Under the Constitution and Decisions of This Court, to Judicial Review.

A construction of § 403 (e)(1) of the Renegotiation Act which would prohibit judicial review of the statutory basis for a determination of excessive profits by the Tax Court would, in the case of an aggrieved contractor, violate the Constitution or, at least, present a serious constitutional question and should be avoided. "'Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution'. . . . A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the act." *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 491-492.

Article III, Section 1, of the Constitution vests the judicial power in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish". Numerous opinions of this Court have reiterated that the determination of the statutory basis of an administrative agency's action is a judicial function. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 144-145. The Tax Court is an administrative agency. 26 U. S. C. 7441, 7443(e) (formerly 1100, 1102(e)); *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716; *Lichter* v. *United States*, 334 U. S. 742, 791-792.

When a contractor believes that there is no basis in the Renegotiation Act for an order of the Tax Court determining excessive profits, the due process clause of the Fifth Amendment immediately becomes relevant. The landmark case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, established that in such a situation "the courts . . . must have power in a proper proceeding to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." 187 U. S. at pp. 109-110. See also *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619-620; *International Railway Co.* v. *Davidson*, 257 U. S. 506.

If necessary for the proper functioning of the government, the judicial inquiry may be postponed by statute until after a collection of funds or a taking of property by an administrative agency, provided that "the opportunity given for the ultimate judicial determination of the liability is adequate". *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 596-597.

Early emphasis upon this right to ultimate judicial inquiry is found in *Cary* v. *Curtis*, 3 How. (U. S.) 236, where the question was whether a statute requiring collectors of customs to pay to the Treasurer of the United States all moneys received barred a suit against a collector for customs duties illegally exacted. The majority of the court concluded that other means of judicial redress were available and decided that the action against the collector was barred. Mr. Justice Story, who believed that no other judicial remedy existed, dissented, saying in part,

> "* * * it never could be the intention of Congress to pass any statute by which the courts of the United States, as well as the State courts, should be excluded from all judicial power in the interpretation of the revenue laws, and that it should be exclusively confided to an executive functionary finally to interpret and execute them—a power which must press severely

upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties." 3 How. at p. 257.

The majority's emphasis upon the availability of other judicial remedies *Id.*, 250 evidenced its adherence to the principle enunciated by Mr. Justice Story.

Subsequent cases have been decided on the assumption that judicial relief was required by the Constitution. For example, in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, had the taxpayer not been entitled, under the Constitution, to judicial relief there would have been no occasion to determine that the administrative procedure coupled with judicial review constituted an adequate remedy. See also *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127, involving the Fourteenth Amendment. *Cities Service Company* v. *McGrath*, 342 U. S. 330, is a recent illustration of this Court's vigilance to assure judicial relief against a collection of funds by an administrative officer of the government, which might later prove to have been without adequate safeguard to the payor.

In upholding the constitutionality of other World War II legislation, this Court has uniformly found that ultimate judicial review was specifically provided or otherwise available. *Estep* v. *United States*, 327 U. S. 114; *Bowles* v. *Willingham*, 321 U. S. 503, 521; *Yakus* v. *United States*, 321 U. S. 414, 442, 444. Cf. *Cities Service Company* v. *McGrath*, 342 U. S. 330. The denial of judicial review under the Renegotiation Act would appear to be without precedent in analogous cases decided by this Court.[23]

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[23] Certain cases in which no constitutional requirement of judicial review has been found are distinguishable because they involved grants, benefits, special relief or "rights", which were matters of legislative grace. *E.g., United States* v. *Williams*, 278 U. S. 255 (veterans benefits); *Henrietta First Moon* v. *Starling White Tail*, 270 U. S. 243 (land grants to Indians); *Work* v. *U. S. ex. rel. Rives*, 267 U. S. 175 (Dent Act relief for World War I contractors); *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (collective bargaining rights under Railway Labor Act).

The District of Columbia Court of Appeals is a proper forum for the judicial review of Tax Court decisions under the Renegotiation Act. § 7482 (formerly § 1141) of the Internal Revenue Code. See also § 3 (e) of the Renegotiation Act of 1948, 50 U. S. C. App. 1193 (e).[24]

The District of Columbia Court has repeatedly held that it has jurisdiction to review Tax Court decisions under the Renegotiation Act on constitutional and jurisdictional questions. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405; *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875, certiorari denied, 343 U. S. 967; *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 177 F. 2d 727, certiorari denied, 339 U. S. 912; *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U. S. 943. Its refusal to review in the instant case is based upon an artificial distinction between jurisdiction and "coverage". The Court based its finding of such a distinction upon the decision of this Court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, despite its recognition that the *Waterman* case turned upon the failure of the contractor to exhaust its administrative remedies and the fact that the question of judicial review was specifically reserved by this Court. See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 755, 771. Unless there

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[24] The suggestion of the Ninth Circuit in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, 565, that Tax Court determinations may be collaterally attacked in District Court suits brought by the Government to collect excessive profits, overlooks the fact that § 403 (e)(1) of the Renegotiation Act provides that the filing of a petition for a redetermination by the Tax Court shall not operate to stay the execution of the order of the Board. Thus a District Court suit might be brought and heard before a contractor could exhaust his administrative remedy in the Tax Court, and the contractor would thus be precluded from collateral attack. Also, if the Government withholds the claimed amount of excessive profits from amounts due the contractor, there is no District Court suit by the Government in which a collateral attack can be made.

is a contract with a "Department" or a subcontract as defined in the Act, the Act has no application and the renegotiation agencies have no statutory power to make any determination of excessive profits. Thus the question whether a particular contract is a contract or subcontract as defined in the Act is jurisdictional in the most fundamental sense.[25]

III.

The Petitioner Is Entitled to Review in the United States Court of Appeals for the District of Columbia Circuit of a Decision of the Tax Court That a Specific Contract Is Not a Contract or Subcontract Defined in the Renegotiation Act.

It is axiomatic that a decision of the Tax Court as to the statutory limits of the revenue laws presents a case or controversy subject to judicial determination, and that in such a case the Commissioner of Internal Revenue, as well as the taxpayer, may have judicial review in a Court of Appeals under § 7482 (formerly § 1141) of the Internal Revenue Code. See *Commissioner of Internal Revenue* v. *Liberty Bank & Trust Co.*, 59 F. 2d 320 (C. C. A. 6).

Section 7482 is not by its terms limited to cases arising under the revenue laws and jurisdiction of the United States Court of Appeals for the District of Columbia Circuit to review decisions of the Tax Court under the Renegotiation Act is invoked under that section. As demonstrated herein, review of a decision of the Tax Court that a specific contract is, or is not, a contract or subcontract defined in the Renegotiation Act is not precluded by § 403 (e)(1).

The nature and purpose of the Renegotiation Act, and the responsibility placed upon the renegotiating agencies

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[25] If a Selective Service Board had ordered the induction of a man eighty years old or a woman, after an exhaustion of administrative remedies, judicial relief would undoubtedly have been available. *Estep* v. *United States*, 327 U. S. 114. From a juridictional point of view, a similar situation is presented when the Tax Court determines excessive profits under a contract which is neither a contract or subcontract defined in the Renegotiation Act.

for the recapture of excessive profits, evidence the intent of Congress that such review may be invoked by a renegotiating agency, as well as a contractor. The position of the renegotiating agency is analogous to that of the Commissioner in a case arising under the revenue laws. See *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 431; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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APPENDIX A.

The Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U. S. C. App. 1191), provides in pertinent part:

> Sec. 403 (a). For the purpose of this section—
>
> (1) The term "Department" means the Department of the Army, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.
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> • • • • •
>
> (3) The terms "renegotiate" and "renegotiation" include a determination by agreement or order under this section of the amount of any excessive profits.
>
> (4) (A) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. . . .
>
> (5) The term "subcontract" means—
>
> (A) Any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, but such term does not include any purchase order or agreement to furnish office supplies; or
>
> (B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: . . .
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> • • • • •

Sec. 403 (c) * * *

(1) . . . If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. . . .

* * * * *

(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

* * * * *

Sec. 403 (e)

(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received

or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

* * * * *

Section 403 (h)

This section shall apply only with respect to profits derived from contracts with the Departments and subcontracts which are determined under regulations prescribed by the Board to be reasonably allocable to performance prior to the close of the termination date. Notwithstanding the method of accounting employed by the contractor in keeping his books, profits determined to be so allocable shall be considered as having been received or accrued not later than the termination date. For the purposes of this subsection, the term "termination date" means whichever of the following dates first occurs—

(1) December 31, 1945; or

(2) the date proclaimed by the President as the date of the termination of hostilities in the present war; or

(3) the date specified in a concurrent resolution of the two Houses of Congress as the date of the termination of hostilities in the present war.

The Internal Revenue Code of 1954, as amended (Public Law 591, 83d Cong., 2d Sess., Title 26 U. S. C.), provides in pertinent part:

Sec. 7482. Courts of review

(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

(b) Venue.—

(1) In general.—Except as provided in paragraph (2), such decisions may be reviewed by the United States Court of Appeals for the circuit in which is located the office to which was made the return of the tax in respect of which the liability arises, or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

Section 7482 (a) and section 7482 (b)(1) contain substantially the same language as section 1141 (a) and section 1141 (b)(1), respectively, of the Internal Revenue Code of 1939, as amended.

APPENDIX B.

Analysis of the Method of Determining the Amount of Excessive Profits.

Consideration of the question presented in this case is facilitated by a cognizance of the steps involved in a renegotiation. The steps are essentially these:

1. The determination of the amount of the contractor's receipts or accruals subject to renegotiation. The Act authorized renegotiation of contracts with certain named departments and agencies and subcontracts thereunder. It also contained exemptions of certain categories of receipts or accruals and authorized the granting of additional exemptions in specified situations. It is thus necessary that a complete examination be made of a contractor's sales in order to segregate its receipts or accruals into renegotiable and non-renegotiable business.

2. The determination of the expenses attributable to the renegotiable receipts or accruals. Two questions must be considered here. It is first necessary to determine the expenses of the contractor allowable under the Renegotiation Act, which provides that expenses allowable for income tax purposes are also allowable for renegotiation. After determining the expenses of the contractor which are properly allowable, it is necessary to determine the portion of such allowable expenses applicable to renegotiable business. This determination requires an examination of the accounting techniques and principles applied in the business of the contractor. After these determinations have been made, the total of allowable expenses applicable to renegotiable business subtracted from the total renegotiable receipts or accruals determines the total profits on renegotiable business.

3. The development of factual data concerning the character of the contractor's business, its efficiency, its level of costs as compared with other producers, the amount of capital employed in renegotiable business, rates of profit

normal in the industry, the extent of risk assumed by the contractor in the performance of renegotiable business, and other facts which would indicate the level of profit that would be reasonable for the particular contractor.

4. The determination of the percentage, if any, of the contractor's profits on renegotiable business which constitutes excessive profits.

Renegotiation thus requires the resolution of various types of questions. In the initial segregation of sales stage, the questions may be purely factual, involving only segregation of receipts concededly covered by the Act. On the other hand, a basic question of law may be confronted at the outset. It may be necessary to decide whether a particular contract, the facts relating to which are not in dispute, is subject to renegotiation. Where only one contract is involved in the renegotiation, unless it is a contract or subcontract defined in the Act, the renegotiating agency has no statutory authority to determine any amount as excessive profits.

The second stage of determining the expenses allowable and allocable to renegotiable business is principally concerned with accounting questions, although the statutory requirement of allowing expenses allowable for income tax purposes may give rise to certain legal questions.

Once the amount of profits subject to renegotiation is determined, the remainder of the process is essentially subjective in nature. If the facts relating to the statutory factors to be considered by the renegotiating agency are not in dispute, its determination of the amount, if any, of excessive profits is wholly a matter of judgment.